

Written Statement of Ireland

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REQUEST FOR AN ADVISORY OPINION

SUBMITTED BY THE SUB-REGIONAL FISHERIES COMMISSION (SRFC)

WRITTEN STATEMENT OF IRELAND

28 NOVEMBER 2013

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1. Introduction

- 1.1 Ireland recalls that by letter dated 27 March 2013, the International Tribunal for the Law of the Sea (hereinafter 'the Tribunal') received a request from the Permanent Secretary of the Sub-Regional Fisheries Commission ('the SRFC') to render an advisory opinion on four questions concerning the regulation of fisheries, citing Article 33 of the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission 2012 ('the 2012 Convention') as the legal basis for its request. This written statement is presented for the consideration of the Tribunal pursuant to its Order dated 24 May 2013 in which, *inter alia*, it invited States Parties to present such statements.
- 1.2 The present written statement is confined to the question of the *jurisdiction* of the Tribunal to provide an advisory opinion in these proceedings.

2. Jurisdiction

- 2.1 The Tribunal was established in accordance with Annex VI of UNCLOS and its jurisdiction is set out in Section 2 of Part XV of UNCLOS at Article 288, paragraphs 1, 2 and 3. Paragraph 1 of Article 288 provides that a court or tribunal referred to in Article 287 (which includes the Tribunal) 'shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with ... Part (XV).' Paragraph 2 provides that the Tribunal 'shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.'
- 2.2 The present request for an advisory opinion submitted to the Tribunal pursuant to the 2012 Convention does not constitute either a 'dispute concerning the interpretation or application of (UNCLOS) ... submitted ... in accordance with ... Part (XV)' or a 'dispute concerning the interpretation or application of an international agreement related to the purposes of UNCLOS because it is not a dispute. It is instead a request for an advisory opinion. In Ireland's view therefore it does not come within the scope of either Paragraphs 1 or 2 of Article 288 of UNCLOS.

2.3 Paragraph 3 of Article 288 provides that the ‘Seabed Disputes Chamber of the ... Tribunal ..., and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith.’ Section 5 of Part XI of UNCLOS is entitled ‘Settlement of Disputes and Advisory Opinions’ and comprises Articles 186 to 191. Pursuant to Article 187 the Seabed Disputes Chamber of the Tribunal is conferred with jurisdiction in disputes with respect to activities in the Area falling within a number of categories set out in that provision. Article 188 of UNCLOS also confers jurisdiction on a special chamber of the Tribunal and on an *ad hoc* chamber of the Seabed Disputes Chamber of the Tribunal in certain disputes with respect to activities in the Area. In addition to these provisions of Section 5 of Part XI, Article 191 provides that

‘The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.’

2.4 As the request for an advisory opinion submitted to the Tribunal by the SRFC is neither a dispute with respect to activities in the Area or a legal question arising within the scope of the activities of the Assembly or Council of the International Seabed Authority, it does not come within the scope of Paragraph 3 of Article 288 of UNCLOS, and therefore within the scope of any provision of Article 288.

2.5 The Tribunal also enjoys jurisdiction to prescribe provisional measures in accordance with Article 290 in disputes that have been duly submitted to it and where it ‘considers that *prima facie* it has jurisdiction under ... Part (XV) or Part XI, section 5’, and similarly to prescribe such measures in disputes submitted to an arbitral tribunal pending the constitution of that tribunal. Finally it has jurisdiction under Article 292 to hear applications for the prompt release of detained fishing vessels. Clearly neither of these provisions of UNCLOS applies to the present request of the SRFC for an advisory opinion.

2.6 It may also be asserted that Article 21 of the Statute of the Tribunal (set out at Annex VI of UNCLOS) provides a legal basis for the present request. Article 21 provides that the ‘jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.’ In Ireland’s view the term ‘all matters specifically provided for in any other agreement which confers jurisdiction on

the Tribunal', must be interpreted in light of, and consistent with, Article 288(2) of UNCLOS. That provision limits the jurisdiction that may be conferred on the Tribunal by other agreements to 'any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.' Accordingly the 'matters' referred to in Article 21 must be construed as meaning 'disputes.' This interpretation is supported by Article 24 of the Statute ('Institution of Proceedings') which refers only to the institution of contested proceedings (i.e. disputes), not advisory ones.¹ The only advisory proceedings contemplated in the Statute of the Tribunal are those submitted to the Seabed Chamber.²

- 2.7 It should also be noted that the formulation used in Article 21 of Annex VI is borrowed from Article 36, paragraph 1 of the Statute of the International Court of Justice³. Article 36(1) of the ICJ Statute has never provided the legal basis for an advisory opinion delivered by the International Court of Justice. As Tomuschat has written, 'Non-contentious proceedings, i.e. proceedings aimed at obtaining from the ICJ an advisory opinion, may only be instituted pursuant to Art. 96 UN Charter...It is obvious that to open advisory proceedings also to States would burden the ICJ with an unmanageable workload, in particular at a time when the membership of the United Nations has risen to 191 States.'⁴
- 2.8 In Ireland's view the Tribunal does not enjoy advisory jurisdiction otherwise than in accordance with Article 191 of UNCLOS. In the absence of an express conferral by the terms of UNCLOS no general advisory jurisdiction can be assumed or inferred. The jurisdiction of international courts and tribunals rests on the consent of States, and States Parties to UNCLOS have not conferred a general jurisdiction on the Tribunal to provide advisory opinions on the interpretation or application of UNCLOS. Moreover, absent express conferral of such jurisdiction by UNCLOS the legal effect of any advisory opinion would be uncertain. One cannot argue by analogy with the International Court of Justice that an advisory opinion of the Tribunal would

¹ Article 24 (1) provides that 'Disputes are submitted to the Tribunal, as the case may be, either by notification of a special agreement or by written application, addressed to the Registrar. In either case, the subject of the dispute and the parties shall be indicated.'

² Article 40(2) provides that 'In the exercise of its functions relating to advisory opinions, the Chamber shall be guided by the provisions of this Annex relating to procedure before the Tribunal to the extent to which it recognizes them to be applicable.'

³ 'The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.'

⁴ The Statute of the International Court of Justice – A Commentary, edited by Zimmermann, Tomuschat and Oellers-Frahm, Oxford, 2006

have no binding effect. The International Court of Justice has distinguished the legal effect of advisory opinions and judgments in contentious proceedings. For instance it has found that the

'situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it ; the reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the Organization, and, in principle, should not be refused.' - (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71)

- 2.9 The non-binding legal affect of advisory opinions given by the International Court of Justice rests in the fact that they are addressed only to the organs of the United Nations authorised to request them pursuant to Article 96 of the Charter and Article 65 of its Statute, and not to States. (Indeed under the Charter it is not open to States to seek advisory opinions except through an organ of the United Nations authorised to do so.)
- 2.10 In contrast, if the Tribunal were to deliver an advisory opinion - absent an express provision of UNCLOS regulating the matter - its addressees may very well include States as well as organs of international organisations. In such circumstances the question arises as to whether such an opinion has binding effect for the States to which it is addressed, or for all States. If States had intended to confer advisory jurisdiction on the Tribunal they would be expected to have addressed this important issue.
- 2.11 Alternatively, if the Tribunal does find that the reference in Article 21 of the Statute to 'all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal' may include requests for advisory opinions as well as disputes, in Ireland's view such an advisory opinion is necessarily limited to the interpretation or application of the terms of the agreement concerned, or to the consistency of that agreement with the terms of UNCLOS. The agreement cannot confer jurisdiction on the Tribunal to provide an advisory opinion on the interpretation or application of provisions of UNCLOS in the abstract. If this were the case any two or more States Parties to UNCLOS could

conclude an agreement between them solely for the purposes of obtaining from the Tribunal an advisory opinion on the interpretation or application of specific provisions of UNCLOS where such an advisory opinion could not be requested pursuant to any provision of UNCLOS itself.

- 2.12 Ireland notes that Article 138 (1) of the Rules of the Tribunal provides that the 'Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.' In Ireland's view, however, this provision extends beyond what is contemplated by UNCLOS. It is useful to recall that the Preparatory Commission established by the States that negotiated the Convention at the end of the Third United Nations Conference on the Law of the Sea prepared draft Rules of the Tribunal as a 'basis for the determination by the Tribunal of its rules of procedure'.⁵ Part VI of these draft Rules, entitled 'Advisory Proceedings', set out draft rules for the conduct of advisory proceedings by the Seabed Disputes Chamber only, in accordance with Articles 159 (10) and 191 of the Convention. No provision was made here, or elsewhere in the draft Rules, for any other type of advisory proceeding. This undoubtedly reflects the views of States that the Convention does not provide for such proceedings. Although Articles 130-137 of the Rules of the Tribunal ultimately adopted by the Tribunal in 1997 largely reflect the draft Rules prepared by States in the Preparatory Commission, no rule resembling Article 138 of the Rules was drafted by the Preparatory Commission.

3. Conclusion

- 3.1 In conclusion, Ireland notes that there are good policy reasons why States, when they negotiated UNCLOS, did not confer general advisory jurisdiction on the Tribunal. In Ireland's view it is not reasonable to suggest that two or more States can conclude an international agreement for the purpose of conferring general advisory jurisdiction on the Tribunal when UNCLOS itself does not confer such jurisdiction. UNCLOS merely enables States to confer additional jurisdiction on the Tribunal by international agreement for the purposes of disputes involving the interpretation or application of the agreement concerned.
- 3.2 Alternatively, if the Tribunal finds that the reference in Article 21 of the Statute to 'all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal' may include requests for advisory

⁵ LOS/PCN/152 (Vol.1) 28 April 1995

opinions as well as disputes, in Ireland's view such an advisory opinion is necessarily limited to the interpretation or application of the agreement itself or of the consistency of that agreement with UNCLOS. Such an agreement cannot however confer jurisdiction on the Tribunal to provide an advisory opinion on the interpretation or application of UNCLOS in the abstract. In the present case the questions submitted to the Tribunal by the SRFC are open-ended and general in nature, and do not refer or relate to any specific provision of the 2012 Convention.